

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
	:	
of	:	
	:	
CHARLES GUILLOZ	:	
	:	
For Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1995	:	
through November 30, 1995.	:	
	:	
	:	DETERMINATION
	:	DTA NOS. 817606
	:	AND 817607
In the Matter of the Petition	:	
	:	
of	:	
	:	
THOMAS E. SAMUELS	:	
	:	
For Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1995	:	
through November 30, 1995.	:	
	:	

Petitioner, Charles Guilloz, 9 Edgemere Drive, Southampton, New York 11968, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1995 through November 30, 1995.

Petitioner, Thomas E. Samuels, 155 Fisherman's Beach Road, Cutchogue, New York 11935, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1995 through November 30, 1995.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, State Office Building, Veterans Memorial Highway, Hauppauge, New

York on December 6, 2000 at 10:30 A.M., with all briefs to be filed by May 7, 2001 which date commenced the six-month period for issuance of this determination. Petitioners appeared by Meltzer, Lippe, Goldstein & Schlissel, P.C. (Marc T. Finer, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Michael P. McKinley, Esq., of counsel).

ISSUES

I. Whether petitioners have established the existence of reasonable cause and the absence of willful neglect to justify the abatement of penalties imposed herein.

II. Whether petitioners are liable for the sales and use taxes due from B.B. & S. Treated Lumber Corp. as persons responsible for the collection and payment of sales tax pursuant to Tax Law §§ 1131 and 1133.

FINDINGS OF FACT

1. B.B. & S. Treated Lumber Corp. ("B.B. & S.") was a firm which specialized in the sale of treated timber, lumber and piling.

2. B.B. & S. filed late sales tax returns and remitted late payments of taxes that were due for the months of March 1995, April 1995, May 1995 and September 1995. Subsequently, the Division of Taxation ("Division") determined that penalties and interest were due.

3. The Division issued notices of determination to petitioners, Thomas E. Samuels and Charles Guilloz, dated June 15, 1998, which assessed deficiencies of penalty and interest. The notices issued to Thomas E. Samuels set forth the following information:

Assessment I.D.	Period Ended	Interest	Penalty	Payments/ Credits	Total
L015108662-7	May 31, 1995	\$2,888.89	\$26,542.25	\$4,020.11	\$25,411.03
L015108661-8	November 30, 1995	\$269.53	\$4,598.32	\$0.0	\$4,867.85

The notices issued to Charles Guilloz contained the following information:

Assessment I.D.	Period Ended	Interest	Penalty	Payments/ Credits	Total
L015129458-7	May 31, 1995	\$2,888.89	\$26,542.25	\$4,020.11	\$25,411.03
L015129457-8	November 30, 1995	\$270.15 ¹	\$4,598.32	\$0.0	\$4,868.47

4. In 1993, there were several instances when sales tax returns were filed late by B.B. & S. As a result, B.B. & S. was issued assessments for late filing. In a letter dated May 26, 1993, the controller of B.B. & S., Kenneth Hayes, asked to have the penalties remitted on the basis that the company had been attempting to restructure itself and to address the demands placed upon it by an expansion into new markets. It was explained that the company needed to modify its accounting system to record these new activities. According to Mr. Hayes, the company had been experiencing problems since adjusting its computer operations. As a result, its accounting cycles, which generate its tax liability, had been delayed and the company was unable to produce the information it needed for filing its returns on time. Mr. Hayes noted that the company had a history of accurate and timely filings and payment, that the problems caused by the installation of the new system were corrected and that the company would be back on timely reporting cycles as of June 1, 1993. In response to this letter, the penalties assessed against B.B. & S. were abated.

5. After the assessment of penalties for the late filing of sales tax returns in 1995, Mr. Hayes wrote a second letter to the Commissioner of Taxation and Finance, dated November 17, 1995, which asked that the penalties be abated. This letter explained that in 1994, the company managed to report on a timely basis. However, in its 1994-1995 fiscal year, the company was growing and increasing its activity into broader markets and a larger customer base. In

¹ It is not clear why Charles Guilloz was assessed \$0.62 more interest than Thomas Samuels.

November 1994, the company contracted with Vormittag Associates to upgrade and convert its computer systems. The next eight months were spent on this project. In the process, the company encountered extensive problems. Because of the difficulties incurred, the monthly closing cycles were sporadic and the reporting was late. Mr. Hayes asked for an understanding of the problems and noted that the company paid the interest due on the delinquent returns. He also noted that the company wished to become a performing entity with respect to its sales tax obligations. In order to buttress his argument, Mr. Hayes included copies of B.B. & S.'s programming billings and software and hardware costs which were incurred in an attempt to resolve the problem. On this occasion, the Division decided that the company did not establish reasonable cause and declined to remit the penalties.

6. The Division based its conclusion that Messrs. Guilloz and Samuels were responsible officers of B.B. & S. on the basis of an examination of the following series of documents:

(a) The Federal corporate income tax return of B.B. & S. for the year 1994 listed Mr. Guilloz and Mr. Samuels as officers and stated that they worked part time for the business. It also stated that they each owned 33.3 percent of the common stock and that they did not receive any compensation.

(b) Messrs. Guilloz and Samuels cosigned promissory notes dated March 22, 1995 for loans from the North Fork Bank to B.B. & S. The notes were signed by George Wieser, as secretary, Thomas Samuels, as chairman of the board, and Charles Guilloz, as vice president.

(c) A Corporate Authorization Resolution, dated March 15, 1995, which had been given to Bridgehampton National Bank, authorized the signatories to open checking accounts in the name of the corporation, endorse checks and orders for the payment of money, withdraw funds on deposit and enter into a lease for the purpose of renting and maintaining a safe deposit box. The

form was signed by, among others, Thomas Samuels, as secretary, and Charles Guilloz, as vice president.

(d) Thomas Samuels signed a lease, dated April 4, 1996, on behalf of B.B. & S.

(e) Thomas E. Samuels, as chairman of the board, executed a Bill of Sale and Assignment from B.B. & S. Treated Lumber Corp. to Best Building & Supply Lumber Corp. ("Best Building"). By this document, B.B. & S. transferred many of its assets to Best Building.

(f) A summons and complaint filed by B.B. & S., Mr. Samuels, Mr. Guilloz and their spouses against North Fork Bank alleged, among other things, that the North Fork Bank and its president induced the plaintiffs to lend money and sign guarantees for loans to B.B. & S. to their detriment.

(g) Mr. Kenneth E. Hayes provided the Division with a sworn statement which provided that he was the comptroller of B.B. & S. from February 1992 until April 1996 and that during this period he was responsible for all of the corporate accounting functions and corporate disbursements. Mr. Hayes maintained that he was supervised by Mr. Guilloz, Mr. Samuels and Mr. Wieser and that from late 1994 until April 1996 he was instructed as to what payments were to be made and in what amounts. In addition, Mr. Hayes stated that in the summer of 1995, he was told by Mr. Samuels and Mr. Guilloz to pay the sales tax, which was late, but not to pay any penalty and interest. According to Mr. Hayes, Mr. Guilloz, Mr. Samuels and Mr. Wieser were actively involved in the financial decision making and daily operations of B.B. & S. Mr. Hayes also asserted that from 1995 until April 1996, he was instructed to follow the directions of Mr. Guilloz and Mr. Samuels and that, if he did not, he would have been fired.

(h) The Division secured an affidavit from George Wieser which stated, among other things, that the corporation maintained a "responsibilities list" which specified that Mr. Samuels,

as chief executive officer and chairman of the board of directors, was responsible for all banking and financial matters, and that Mr. Guilloz was allegedly responsible for all operational matters and the daily management of the business.

7. In 1971, Thomas Samuels, Charles Guilloz and Vincent Mauceri purchased B.B. & S. from a company known as Babinsky, Babinsky & Siegel. The company sold creosoted lumber. Prior to the periods in issue, Mr. Mauceri disposed of his interest in the business and Mr. George Wieser became a shareholder.

8. Prior to acquiring B.B. & S., Messrs. Samuels and Guilloz were active in a marine contracting business known as James H. Rambo, Incorporated ("Rambo"). Rambo built docks and bulkheads. It also engaged in hydraulic dredging. Mr. Samuels and Mr. Guilloz each owned 50 percent of Rambo. They purchased B.B. & S. because Rambo needed a steady supply of treated lumber for its marine contracting business.

9. Mr. Samuels held the titles of chairman of the board and secretary. He became an officer of the corporation because the firm needed officers to deal with banks. Mr. Samuels did not hire or fire employees, manage employees, direct or authorize the payment of bills, have dealings with suppliers and customers of the company, negotiate large corporate purchases, open or close bank accounts, authorize or make bank deposits, sign corporate checks or decide what creditors were going to be paid, review, prepare or sign any Federal or state tax returns, authorize the payment of federal deposits or determine company financial policy.

10. Mr. Samuels had no involvement in the day-to-day operations of B.B. & S. because his time was consumed operating Rambo. Although B.B. & S. had a good foreman, he still needed to be supervised. Mr. Samuels's time was also occupied dealing with regulatory agencies on behalf of Rambo. He did not receive a salary from B.B. & S. during the period in issue.

11. B.B. & S. had one checking account during the period in issue and Mr. Samuels was not authorized to sign checks on this account. He did not sign any checks on behalf of the company.

12. Initially, Mr. Mauceri was responsible for the day-to-day operation of the business. When he left, Mr. George Weiser was appointed to this position. George Wieser ran the business for about 10 years prior to the sales tax issues developing. Mr. Weiser was responsible for hiring B.B. & S.'s comptroller, Mr. Kenneth Hayes. Mr. Hayes was also the accountant or comptroller for George Wieser's other business which he ran out of B.B. & S. If Mr. Hayes had a problem, he would confer with George Wieser. At the time he was running the business, Mr. Guilloz and Mr. Samuels thought that Mr. Wieser was capable and relied upon Mr. Wieser's and Mr. Hayes's abilities.

13. As the comptroller for B.B. & S., Mr. Hayes was responsible for preparing the tax returns and making payments on behalf of the company. Mr. Hayes signed the sales tax returns, payroll tax returns and any other returns that had to be filed on a monthly or quarterly basis. He was assigned to this task by George Wieser.

14. B.B.& S. had a line of credit with North Fork Bank. When the corporation needed credit, Mr. Wieser would call Mr. Kanas or his representatives at North Fork Bank and request the needed funds. Mr. Weiser did not have to check with Mr. Samuels before calling Mr. Kanas.

15. Mr. Samuels guaranteed the bank loans to B.B.& S. because, in his experience, a small business cannot obtain a bank loan without a personal guarantee. Mr. Guilloz guaranteed the bank loans to B.B. & S. for the same reason.

16. Mr. Samuels did not direct Mr. Hayes to not pay the corporate debts without his approval or to withhold the payment of penalties and interest on the sales tax due for the periods

in question. Further, Mr. Samuels did not threaten to fire Mr. Hayes if he paid the penalties and interest.

17. B.B. & S. held an annual meeting which included Mr. Wieser, Mr. Guilloz, Mr. Samuels, Mr. Hayes and Mr. Kanas.

18. Mr. Guilloz's duties did not include hiring and firing employees, managing employees, directing or authorizing the payment of bills, dealing with the company's large suppliers or customers, negotiating corporate purchases, contracts or loans, opening or closing bank accounts, signing corporate checks or deciding which creditors would be paid, making or authorizing bank deposits, or signing payroll checks. He did not prepare, review or sign Federal or state tax returns. He did not authorize the payment of Federal deposits or determine corporate policy.

19. Mr. Guilloz never opened a checking account or signed any checks on behalf of the company.

20. Mr. Guilloz did not work for B.B. & S. and did not receive a salary. He did not receive dividends during the periods in issue.

21. Mr. Guilloz never told Kenneth Hayes to not make a payment of penalty and interest to the Division. In addition, he never told George Wieser that he would be fired if he did not do what he was told.

22. During the periods in issue, Mr. Guilloz did not speak to Mr. Wieser more than once every two weeks. However, Mr. Guilloz knew that the business was experiencing cash flow problems during the periods in issue. From time to time, Mr. Guilloz was presented with and reviewed the records of the corporation.

23. Michael Bukovsky was a senior staff accountant for Levine, Greenberg & Company which was the outside accounting firm for B.B. & S. Mr. Bukovsky prepared the year-end corporate tax returns and the corporate financial statements. In this capacity, the only people he had dealings with were Kenneth Hayes, as controller, and George Wieser, as the operational owner of the business. Mr. Bukovsky knew that, of the three owners, Mr. Wieser was the one who was designated to run the daily operations and to make sure that the records were kept up to date. Mr. Bukovsky never spoke to petitioners about B.B. & S. because he knew that they were not involved in that firm's daily operation. If Mr. Bukovsky had a question, he would first speak to Mr. Hayes. If Mr. Hayes was unable to answer the question, he would then speak to George Wieser.

24. It was Mr. Bukovsky's understanding that petitioners continued to finance B.B. & S., despite having sustained losses, because they were hoping to rectify the corporation's financial situation.

25. The statement on the corporate income tax return that petitioners worked part time (Finding of Fact "6[a]") was erroneous. The return should have said part time as required, but the words would not fit into the space provided.

26. Best Building Supply and Lumber Corp. ("Best Building") purchased the tangible personal property of B.B. & S. in April 1996. Since the purchaser bought just the tangible personal property and not the real estate, a subsidiary of the purchaser, East End Realty, and B.B. & S. entered into a lease for a period of 10 years, with options for additional periods, to operate the premises.

27. After Best Building acquired the assets of B.B. & S., the new corporation retained many of the members of the original staff because the principals of the new corporation felt that

there should be continuity and because they were familiar with the operation of the business.

Best Building retained Kenneth Hayes in his position as controller.

28. In March 1999, the new corporation decided that Mr. Hayes's services were no longer required because it discovered that in August 1996 he had begun embezzling funds. Mr. Hayes executed an Affidavit of Confession of Judgment, dated May 22, 1999, authorizing the entry of a judgment against him, in favor of Best Building, in the amount of \$168,014.34.

29. The night before the closing between B.B. & S. and Best Building, the parties gathered at the offices of the seller's attorney. One of the attorneys for the seller asked Mr. Hayes to make a representation, as the controller of the company, that all of the taxes, including but not limited to sales tax, had been paid and were up to date. Mr. Hayes replied that they were. In part, on that basis, Best Building purchased the company. Had Best Building known that some taxes had not been paid, it would have required that certain amounts of money be placed in escrow to cover any liabilities that might arise.

30. George Weiser was in the office of B.B. & S. three or four hours a day on the days he worked which were sporadic. Kenneth Hayes was in the office five days a week from 7:00 A.M. or 7:30 A.M. until 5:00 P.M. or 6:00 P.M.

31. B.B. & S. did not employ anyone on a part-time basis without paying compensation.

32. B.B. & S. did not have the responsibilities list referred to in the affidavit of George Wieser.

33. The Board of Directors of B.B. & S. did not hold formal meetings. There might be conference calls among the directors at two or three week intervals. Frequently, the conversations would occur less than monthly.

SUMMARY OF THE PARTIES' POSITIONS

34. Petitioners argue that there is reasonable cause to remit penalties because the corporation's failure to timely remit the sales tax was attributable to the internal chaos arising from the expansion of the corporation's customer base into broader markets. They further argued that the corporation was in the process of converting and upgrading its computer systems and that this was a problematic and costly process which had not been completed for a period of eight months, including the periods at issue here. According to petitioners, the foregoing factors caused the monthly closing cycles of the corporation to become sporadic resulting in late reporting and payment of taxes.

Petitioners also assert that the evidence shows that they were passive investors in the corporation and that the title of vice president given to Charles Guilloz and the titles of chairman of the board and secretary given to Thomas E. Samuels were ceremonial. Petitioners contend that George Weiser was responsible for the financial affairs and management of the corporation. According to petitioners, none of the documents offered by the Division indicate that petitioners were actively involved in the corporation.

Relying upon ***Matter of Rusack*** (Tax Appeals Tribunal February 8, 1996), petitioners contend that they were precluded from exercising authority over the financial affairs of the corporation because of the false information provided by George Weiser. Petitioners posit that the financial statements provided by George Weiser were inaccurate because they omitted current financial information that was necessary to develop a true understanding of the financial position of the corporation.

35. In response, the Division argues that the corporation's late filing and late payments in 1995 were not due to reasonable cause. The Division submits that the corporation's previous

compliance record should be considered. Further, the Division maintains that the most likely reason why B.B. & S. was late in filing returns and paying taxes was that it had cash flow problems and this does not constitute reasonable cause. The Division also maintains that petitioners are persons responsible for the collection and payment of sales and use taxes.

36. In a reply brief, petitioners argue that the fact that the corporation was able to timely file its returns from June 1993 until February 1995 shows that the problems experienced by the corporation in 1995 were independent of the problems experienced in 1993. Petitioners also maintain that the corporation's failure to satisfy its sales tax liability arose from an inability to obtain sales tax data necessary to determine the sales tax liability. Petitioners also submit that the failure to timely file sales tax returns in 1993 does not prevent a finding that reasonable cause exists to abate the 1995 penalties.

Petitioners posit that they had no active involvement in the business and were passive investors. According to petitioners, George Weiser did not provide accurate information regarding the sales tax deficiency for the relevant periods. Thus, petitioners maintain that "even if Petitioners had the apparent authority to perform the duties described above, the Petitioners were effectively precluded from exercising this authority because of the false statements of and inaccurate documents provided by George Weiser." (Petitioners' reply brief, p.9.)

CONCLUSIONS OF LAW

A. Tax Law § 1145(a)(1) provides that "any person failing to file a return or to pay . . . any tax . . . within the time required by or pursuant to this article . . . shall be subject to a penalty" In order to have the penalties remitted, petitioners must establish that "such failure or delay was due to reasonable cause and not due to willful neglect." (Tax Law § 1145[A][1][iii].) During the

periods in issue, 20 NYCRR former 536.5[c][3] provided that reasonable cause included the following:

The inability, for reasons beyond the taxpayer's control, to timely obtain and assemble essential information required for the preparation of a complete return, despite the exercise of reasonable efforts, may constitute reasonable cause provided a return is timely filed and the tax is timely paid or paid over on that portion of the tax liability which can be ascertained. The relevant facts affecting that portion of the tax liability which cannot be ascertained must be fully disclosed with the timely filed return and when such liability is ascertained, and when applicable collected, an amended return must be immediately filed together with any additional tax due.

Example 3: Due to an inability to obtain certain records, a taxpayer was unable for reasons beyond its control to determine its proper tax liability prior to the prescribed date for paying its tax. The taxpayer timely filed a return and paid the tax due on that portion of the tax liability which was ascertainable. Attached to the return was a rider which explained in detail why the proper tax liability could not be determined prior to the due date. When the records in question were obtained and assembled, an amended return was immediately filed and the additional tax due was paid. This constitutes reasonable cause for failure to pay the tax due.

B. Petitioners have not satisfied the foregoing criteria. Assuming that they could not have obtained the information necessary to file a complete return, they have not established that they could not have filed a return and that no portion of the tax liability was ascertainable. Therefore, it is concluded that petitioners have not established reasonable cause for the failure to pay the tax due. It is noted that the Division's argument that the failure to pay was due to cash flow problems is rejected as speculative.

C. Tax Law § 1133(a) imposes upon any person required to collect the tax imposed by Article 28 of the Tax Law personal liability for the tax imposed, collected or required to be collected. A person required to collect tax is defined to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28 (Tax Law § 1131[1]).

D. The holding of corporate office does not automatically impose tax liability upon an office holder (*Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427). Rather, the resolution of whether a person is responsible for collecting and remitting sales tax for a corporation so that the person would have personal liability for the taxes not collected or paid depends on the facts of each case (*Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564; *Stacy v. State*, 82 Misc 2d 181, 368 NYS2d 448). The Commissioner's regulations examine whether the person is authorized to sign the corporation's tax returns, is in charge of maintaining corporate records, or is responsible for managing the corporation (20 NYCRR 526.11[b][2]). In *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990), the Tax Appeals Tribunal stated :

The question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interest in the corporation [citations omitted] (*Matter of Constantino, supra*).

E. Initially, it is noted that petitioners' attempt to assign responsibility to George Weiser is unavailing. Even if George Weiser is responsible, the same would not excuse petitioners from liability because the liability for the sales taxes is joint and several (*see, Matter of Wendel*, Tax Appeals Tribunal, February 3, 2000).

F. Clearly, petitioners do not satisfy most of the criteria which are examined to determine whether an officer is liable for the sales taxes due from a corporation.² The record shows that

² It is recognized that certain portions of the affidavits offered by the Division are in direct conflict with the testimony of each petitioner. The weight accorded to the affidavits offered by the Division has been discounted by the fact that petitioners were present and, unlike the evidence presented in affidavits, the demeanor of the petitioners could be viewed during direct and cross-examination. The testimony of each petitioner is found to be

petitioners did not hire or fire employees, manage employees, direct or authorize the payment of bills, have dealings with suppliers and customers of the company, negotiate large corporate purchases, open or close bank accounts, authorize or make bank deposits, sign corporate checks, decide which creditors would be paid, prepare, review or sign any Federal or state tax returns or determine B.B. & S.'s financial policy.

G. In its brief, the Division argues that:

It must be presumed that the articles of incorporation and bylaws gave the petitioners (as Chairman of the Board/Secretary and Vice President, respectively) broad authority to act for the Corporation and imposed responsibility for insuring that B.B. & S. duties and obligations, including tax liabilities were fulfilled. Thus, petitioners' positions as directors and officers make them personally liable for the unpaid penalties and interest. (Division's brief, p.10.)

H. The foregoing argument is rejected because it is purely speculative. There is no evidence to support this position. The imposition of liability for sales taxes may not be based on conjecture.

I. The Division's argument that petitioners received dividends prior to the periods in issue simply shows that they were shareholders. In addition, it is noted that petitioners did not receive dividends during the periods in issue. Petitioners have also shown that the fact that they guaranteed loans to the corporation is merely reflective of the fact that B.B. & S. was a closely-held corporation and that the banks in the area would not lend money to the corporation without a personal guarantee. Therefore, in this instance, it is not an indication of control over the financial affairs of the business. The fact that petitioners were aware of the corporation's inventory and

credible. Further, it is clear that Mr. Weiser advised the Division's representative that he had intended to appear at the hearing. His unexplained failure to appear leads me to ask whether he was absent because he did not wish to be examined on the factual assertions in his affidavit. Mr. Hayes's credibility is diminished by the fact that he has previously made erroneous statements regarding the payment of sales tax at the closing of B.B. & S. His reliability is also reduced by his admission to having taken funds from Best Building.

purchasing problems and were well educated has no bearing on their potential liability for the penalties and interest in issue.

J. The case of *Matter of Risoli v. Commr. of Taxation and Finance* (237 AD2d 675, 654 NYS2d 218) is instructive. Although this case involved withholding tax, it has been relied upon in cases which concerned withholding tax and sales and use taxes (*e.g., Matter of Wendel, supra*). In *Risoli*, the Court found that petitioner was the president of the corporation, received substantial income from the corporation during the period in issue and was a one-third shareholder. Further, petitioner had the authority to sign checks and, on occasion, exercised this authority. Petitioner was also directly involved in attempting to resolve financial problems. On the basis of these facts, the Appellate Division determined that the Tribunal could rationally conclude that the petitioner had broad oversight authority over the management of the firm and the fact that he did not exercise that authority did not prevent him from being a responsible person.

K. Here, many of the operative facts are different from those presented in *Risoli*. There is no evidence in this case that either petitioner received any income from B.B. & S. during the periods in issue. Neither petitioner signed any checks on behalf of the corporation or had check signing authority. Other than acting as guarantors of loans to the corporation, which they were required to do as major stockholders of a closely held corporation, there is no evidence in this case that petitioners had broad oversight authority with respect to the management of the corporation. Accordingly, it is concluded that petitioners are not responsible for the collection and payment of sales tax pursuant to Tax Law §§ 1131 and 1133.

L. The foregoing disposition renders petitioners' alternative argument, that they were prevented from exercising their authority, moot. However, it is noted that *Matter of Russack*

(Tax Appeals Tribunal, February 25, 1999) is inapplicable because there is no evidence that petitioners regularly supervised the financial affairs of the corporation or made inquiries as to whether sales tax was being paid.

M. The petition of Charles Guilloz is granted and the notices of determination, dated June 15, 1998, are canceled.

N. The petition of Thomas E. Samuels is granted and the notices of determination, dated June 15, 1998, are canceled.

DATED: Troy, New York
October 25, 2001

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE